. 21393

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

COLAS RUIS RUBIO, Petitioner, Appellant, vs. MIGRATION AND NATURALIZATION RVICE, Respondent.	)

APPELLANT'S OPENING BRIEF

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TOPICAL INDEX

LIST OF AUTHORITIES CITES

IN THE

UNITED STATES COURT OF APPEALS

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No. 21393

NICOLAS RUIS RUBIO, Petitioner, Appellant, vs. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	PETITIONER'S BRIEF ON PETITION FOR JUDICIAL REVIEW

JURISDICTION

Jurisdiction is hereby invoked under the provisions of Section 241(a)(11) of the Immigration and Naturalization Act of Volume 8 U.S.C.A. and sections 242 of the Immigration and Naturalization Act. Jurisdiction of the District Court is predicated upon Title 18 U.S. Code., Section 323.

STATEMENT OF THE CASE

Appellant is an alien, a native and citizen of the Republi of Mexico, and was lawfully admitted to the United States as a legal resident and had a good record up until September 27, 1965 at which time a plea of "Nolo Contendre" was entered for violation of section 11530 of the Health and Safety Code,

State of California. On December 7, 1965, the Court, after having ordered a probation report, "Suspended proceedings." Probation was granted for a period of three years on condition that appellant spent the first 30 days in the County Jail and cooperate with the probation officer in meeting certain other terms of his probation.

Thereafter, the Immigration and Naturalization Service instituted deportation proceedings against appellant by orderin an "Order to Show Cause", charging appellant with violation of section 241(a)(11) of the Immigration and Naturalization Act 8 U.S.C. 1251 (a)(11) providing in part for the deportation of any alien who at any time has been convicted of a violation of or a conspiracy to violate any law or regulation relating to the illicit possession of or traffic of narcotics, drugs, or marijuana.

Hearing was conducted by a special inquiry officer of the Immigration and Naturalization Service and after evidence was received on the 25th day of March, 1966 rendered his decision ordering the deportation from the United States of appellant herein. Appellant did within the time prescribed by law, filed Notice of Appeal to the Board of Immigration Appeals from the decision of said special inquiry officer. The said Board, did on October 20, 1966, order the appeal dismissed and affirmed the decision of the special inquiry officer.

STATEMENT OF FACTS

At the Order to Show Cause hearing, conducted on

March 25, 1966, appellant admitted: 1. That he was not a citizen or nationale of the United States. 2. That he was a native of Mexico and a citizen of Mexico. 3. That he entered the United States at San Jacinto, California on January 19, 1960. 4. That he was then admitted as an Immigra but denied the fifth allegation that on December 7, 1965, In the Superior Court of the State of California, County of Los Angeles, he was convicted for the offense of possession of marijuana in violation of section 11530 of the Health and Safety Code of the State of California. He further denied tha he was subject to deportation pursuant to the provisions of law under section 241(a)(11) of the Immigration and Naturalization Act, in that, he had been convicted of a violation of any law or regulation relating to the illicit possession of marijuana in violation of section 11530 of the Health and Safety Code of the State of California.

At that hearing an affidavit was submitted by the Government's Counsel, signed by the appellant, to which affidavit there was an objection entered. The affidavit is item 85 of records file of deportation proceedings. After the Government had no further questions and no further evidence, the special inquiry officer requested of appellant's counsel whether he desired to question respondent. Counsel made a motion for an opportunity to file a predecision brief in behal of appellant. (Transcript of Hearing held January 24, 1966, page 75 of the administrative record.) Counsel for appellant

moved that the Court permit and preserve the right for Counsel to be given and granted an opportunity to reopen the case in a future date. (Page 78 of Administrative Record.) Counsel was given twenty (20) days in which to prepare a predecision brief. The predecision brief was tendered within the time allotted and at the time of tendering the said brief a transmittal letter was filed with it wherein appellant's counsel requested that he be advised of the continued date. This is letter dated February 14, 1966. (Page 44 of Administrative record.) On March 25, 1966, special inquiry officer rendered his decision and ordered that the appellant be deported from the United States to Mexico on the charges contained in the Order to Show Cause. On July 7, 1966, the special inquiry officer, after he had rendered his decision and upon a review of the record he noticed that the record indicated that the hearing was subject to a resumption of the proceedings, if request was made within twenty days. Noting also that such request was made by the cover letter of February 14, 1966, Further, paragraph 3 of said letter (Page 25 of Administrative Record) states whether we desire further proceedings in this matter.

A letter of July 29, 1966, written by appellant's counsel in answer to the July 7, 1966, letter of the special hearing officer indicates that appellant did not desire a further hearing on this matter.

After the March 25, 1966 Order rendered by the special

hearing officer, ordering the deportation from the United States of appellant herein and within the time prescribed by law appellant filed a Notice of Appeal to the Board of Immigration Appeals from the decision of said inquiry officer. The Board did, on October 20, 1966, ordered the appeal dismissed and affirmed the decision of the special inquiry officer.

Thereafter, and within the time prescribed by law, the appellant filed a petition for judicial review.

SPECIFICATION OF ERRORS

The special hearing officer and the Board of Immigration Appeals erred, as a matter of law, in determining that:

1. Rendering an order deporting the appellant after the Government had rested its case, but prior to any evidence being submitted by appellant.

2. That petitioner was a deportable alien and that he had been convicted of a violation of section 11530 of the Health and Safety Code of the State of California.

3. That he was subject to deportation under the provisions of section 241(a)(11) of the Immigration and Naturalization Act.

4. That appellant's proceedings had reached such finality, upon which an order of deportation could be predicated.

5. In that appellant was denied due process of law under the Fourteenth Amendment of the Constitution of the United States.

6. In that appellant is being subjected to cruel and

inhuman punishment under the Eighth Amendment of the Constitution of the United States.

ARGUMENT

I

ERROR IN RENDERING ORDER DEPORTING APPELLANT AFTER GOVERNMENT RESTED ITS CASE BUT PRIOR TO APPELLANT RESTING ITS CASE

Appellant's rights were violated in the special hearing officer's order prior to appellant's resting its case constituted a violation of the Due Process Clause of the United States Constitution.

Appellant's position may be that a request was made by letter dated July 7, 1966, to advise the special hearing officer, if further hearing was desired, and that appellant's counsel advised the hearing officer that no further hearing was desired.

It is submitted that at the time appellant's counsel refused a reopening of the case the hearing officer had determined the case and rendered his decision and "Order of Deportation" was already entered. The appellant's position had already been prejudiced. It was not the position of the appellant's counsel to agree to a reopening of the hearing. It was the duty and obligation of the hearing officer to "Set the Decision of Deportation Aside" and proceed with the hearing. A statement by appellant's counsel that he did not "desire a further hearing", on a proceeding which was already determined by the hearing

officer and where an order of deportation was entered, does not constitute a waiver of appellant's right to charge that there was a violation of his constitutional rights in that he did not get a just and fair hearing.

II

RULING THAT PETITIONER WAS A DEPORTABLE ALIEN AND HAD BEEN CONVICTED OF A VIOLATION OF VIOLATION OF SECTION 11500 OF THE HEALTH AND SAFETY CODE OF THE STATE OF CALIFORNIA SO AS TO FALL WITHIN THE MEANING OF SECTION 241(a)(11) OF THE IMMIGRATION AND NATURALIZATION ACT

It is the appellant's contention that he is not deportable pursuant to the provisions of Section 241(a)(11) of the Immigration and Naturalization Act, in that he has not been convicted of a violation of unlawful possession of narcotics under the provisions of Section 241 of the Immigration and Naturalization Act or that he is a deportable alien.

"Section 241(a)(11) reads as follows:

"'Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who -

"'(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a

conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing giving away, importation, or exportation of opium, coca leaves, heroin, harihuana, any sale derivative or preparation of opium or coca leaves or isonipecaine or any addiction forming or addiction=sustaining opiate.' (8U.S.C.A. 1251)

A DEFENDANT FOUND GUILTY OF A NARCOTICS VIOLATION WHEREIN A TRIAL COURT'S SUSPENDED PROCEEDING AND WHEREIN A PLEA OF NOLO CONTENDERE HAS BEEN MADE, HAS NOT BEEN CONVICTED AND THUS HAS NOT LOST HIS CIVIL RIGHTS AND, THEREFORE, NOT SUBJECT TO DEPORTATION.

Where an alien has been found guilty of narcotics violation and where a Nolo Contendere plea has been entered and proceedings against him are suspended, as in the instant matter, he has not lost any of his civil rights under the State and Federal Constitutions, and, therefore, not subject to deporation from the United States upon the grounds that he has been 'convicted' which subjects him to the loss of his civil rights to be and remain in the United States.

Wherein a plea of Nolo Contendere is entered, it

is called a plea of "non vult", which literally means 'I do not wish to contend,' but it does not per se mean to establish that the Respondent is admitting guilt.

Assuming but not admitting a plea of Nolo Contendere is an admission of guilt, it is only an admission for the purposes of the case and cannot be used as an admission in a civil case for the same act and does not estop defendant to deny facts upon which the prosecution was based in subsequent civil proceedings. Twin Ports Oil Co. v. Pure Oil., D.C. Minn, 26 F.Supp. 266, 376. It is contended that deportation is not a criminal proceedings but is civil in fact and to institute criminal or quasi-criminal type proceedings is to impose great hardships and to do so is in complete violation of Due Process.

Appellant has not been convicted of a crime which subjects him to deportation. As held in Bubar v. Dizdar, 60 N.W.2d 77, 79, 80; 240 Minn. 261, a conviction is in its technical legal sense the final consummation of prosecution against the accused, including judgment or sentence or plea of guilty. Here, Respondent did not plead guilty. The respondent plead nolo Contendere. It is an elementary rule that a judgment is not evidence of the facts adjudicated by it. As was held in State v. L.A. Rose, 52 A. 943; 71 N.H. 435 (Supt. Ct. N.H. 1902)

(p. 945):

> "'. . . Under the plea of Nolo, the defendant does not confess or acknowledge the charge against him as upon a plea of guilty (or verdict); but, waiving his right to contest the truth of the charge against him, submits a punishment. The plea is in the nature of a compromise between the state and the defendant, - a matter not of right but of favor. Various reasons exist why a defendant, conscious of innocence, may willing to forego his right to make defense, if he can be permitted to do so without acknowledging his guilt. Whether in a particular case, he should be permitted to do so, is for the court.' (Emphasis added)

The Department of Immigration cannot condemn the Appellant and subject him to deportation in this matter, depriving him of his civil rights. Here, Appellant did not confess any guilt; Appellant was not found guilty after a full trial on the merits; here he forewent a defense, and as held in the above referenced case, it does not per se mean a confession or acknowledgment of the accusation.

The Judge in the Superior Court in his opinion found defendant (Appellant) guilty as charged. His findings were perhaps based on Appellant's failure to allege a defense, but again we will reiterate that this did not per se indicate guilt or acknowledge the crime.

An alien who has been found guilty of a narcotics violation, to-wit, possession on a Nolo Contendere plea, should not lose his civil rights under the state or federal constitutions. To deport him is to violate said civil right.

Nolo Contendere means that the accused will not contest it and in such plea the accused states he does not wish to contend with the state, Winesett v. Scheidt, 79 S.E.2d 501, 504, 239 N.C. 190. It is axiomatic that technically a plea of Nolo Contendere is an ancient plea in criminal cases, where the legal effect of the plea is offered and accepted by the court in respect to the case in which it is interposed, and in respect to that case only.

It has been held that Nolo Contendere cannot be used against the accused as an admission in any civil case; thus, it would follow that a finding of guilt in a case of possession of marihuana based on a Nolo Contendere plea cannot be used at an immigration hearing to establish bases for deportability of an alien pursuant to Section 241(a)(11) of the Immigration and Nationality Act.

The case of Wright v. State, 44 S.E.2d 569, 75 Ga. App. 764, held that:

"'. . . Nolo contendere cannot be used against accused as an admission in any civil suit for the same

act and the plea may not be used to effect civil rights or to effect civil disqualification. . . .'

Here by permitting and allowing the findings of prior criminal court into this hearing is to use the Nolo Contendere plea as an admission to deprive Respondent of his civil rights and civil qualifications, and it is further alleged here by Respondent that this cannot be done by the Board because the Board hearing in effect constitutes a civil suit.

Evidence of a plea of Nolo Contendere is not admissible either as an admission or as proof of guilt, and this is so whether the instant case is based on the same facts or whether the instant case is founded upon unrelated facts. Piassick v. United States, 253 F.2d 658 (U.S.C.A. 5th, 1958). It would therefore follow that the evidence of conviction of the criminal case involving Respondent should not be admitted to disqualify him of his civil rights.

The doctrine of dual definition can be a very useful tool in the administration of justice when its many applications, both criminal and civil, are well understood. But when misunderstood and misapplied, miscarriages of justice may result.

Application to the felony/misdemanor offense -

Section 17 Penal Code, in distinguishing felonies from misdemeanors, provides that where a crime is

punishable in the alternative either by a prison sentence or by a county jail sentence or fine it shall be deemed a misdemeanor 'after a judgment imposing a punishment' other than a state prison sentence.

A plethora of offenses defined in the Penal Code and in penal sections of other codes are punishable in the alternative, some being specifically declared felonies and some not. Even when declared felonies, they are nevertheless deemed misdemeanors if an applicable misdemeanor sentence is imposed. (Witkin, Calif. Crimes, Vol. 1, p. 43). However, a felony punishable only by imprisonment in the state prison remains a felony even though a county jail term is imposed as a condition of probation. Such a jail term is not a sentence. (In Re Hays (1953), 120 C.A.2d 308; In Re Goetz (1941), 46 C.A.2d 848).

California courts long ago adopted and still adhere to the 'narrow' definition of conviction in felony/misdemeanor cases, and upon a plea, finding or verdict of guilty, a felony status immediately attaches, and the offense remains a felony except when the discretion of the court is actually exercised and the prisoner is punished only by fine or imprisonment in county jail. (People v. Williams (1945), 27 Cal.2d 220; In Re Rogers (1937), 20 C .A.2d at p. 400; People v. Banks, 53 Cal.2d 370.)

Thus, where probation is granted with the imposition of 30 days in county jail, the court has 'excercised its discretion' to impose a misdemeanor sentence, and the offense remains a felony, subject, however, to exceptions relating to civil rights and privileges. The court may, however, declare the offense to be a misdemeanor. (Section 17 Penal Code, as amended in 1963.)"

The word "conviction" is of equivocal meaning and its use in a statute may vary with the particular statute involved and it presents a question of legislative intent. De Vean v. Braisted, 174 N.Y.S. 2d 596, 605, 5 A.D.2d. 60d.

Appellant, therefore, contends that the quiivocal meaning of the word "conviction" as applied to the plea Nolo Contendere establishes a punishment for failure on the part of appellant to answer the charge. Having been found guilty on the Nolo Contendere plea, however, this does not mean that appellant was in fact convicted.

"Conviction" in its legal sense, means the final consummation of a prosecution against the accused including judgment or sentence rendered pursuant to a verdict, confession or plea of guilty. Bubar v. Dizdar, 60 N.W.2d. 77. 79. 80. 240 M.M.M. 26.

Section 241 (a)(11) spells out that a person is deportable if convicted but the Act fails most seriously in defining upon what guilt the conviction should be based. As the word conviction is broad in scope and has an equivocal meaning, it

is appellant's contention that the failure to fix and attach a significance to the word conviction in the Act itself is a violation of the Due Process Clause of the Federal Constitution

The case of Jones v. Kelly, 194 N.W.2d 585, 586, 588, 9A.D.2d 395, established that there is no fixed significance attached to the word conviction or the phrase "judgment of conviction", and courts are free to look for legislative intent with respect to the meaning of such words. It would thus follow that no fixed significance having been established in the Act itself and the appellant having the legal right not to contest and entering a plea of Nolo Contendere, that it is the obligation of this Court to establish legislative intent and the rendering of punishment does not per se mean a conviction and the fact that the Act herein referred to is lacking in proper construction, it can not arbritarily make a clean sweep of all cases where a person has been punished. A conviction means a judicial determination of contested facts. C.L. % 6194. People v. Brown, 286 P. 859, 861, 87 Color. 261. Therefore it does not mean a sentence per se nor a plea.

The meaning of the word convicted when used in the criminal statutes varies with the context of the particular statute in which it is used. State vs. De Bery, 103 A2d 523, 524, 150 Me. 28; therefore it follows that the act referred to herein is lacking in explicitness and thus would have different interpretation.

The Chairman of the Immigration and Naturalization Board of Appeals contends that in their opinion the state courts rendering of a judgment granting the appellant a three year period of probation with a 30 day jail sentence amounted to a setnence sustained the evidence of record does not in our opinion constitute a conviction. As indicated above it is appellant's contention that the word convicted varies with the context of the particular statute or case and unless the act specifically spelled it out it is an arbitrary act on the part of the Immigration and Naturalization Department to interpret punishment, where the proceedings are suspended, on a Nolo Contendere plea, as arbritarily meaning a conviction, since the word "conviction" is of an equivocal meaning without any special significance attached thereto.

It is therefore, contended that there has been a flagrant violation of the Due Process Clause of the Constitution.

That appellant was subjected to cruel and inhuman punishment.

The Board of Immigration Appeals urges that it is not within the province of the Board to pass on the constitutionality of the Immigration laws it adjudicates and administers and he quotes matter of L., 4 I & N Dec. 556, BIA, November 21, 1951.

It is respectfully submitted that the Board can not validly argue such a position. The Board has a duty to evaluate and administer the laws properly. This requires an interpretation of the law as intended by the Legislature and the fathers of

the Constitution. To rule without proper construction of the law is to breach the rights of the people under the protection of the Constitution.

Assuming but not admitting that it is within the province of the Board to pass on the constitutionality of the laws it adjudicates and administers then it is certainly within the province of this Court to rule thereon.

The Immigration Department, without information concerning the factual situation of Appellant's culpability, extent of involvement in in the commission of the offense, and his history and background, now seeks to enforce an order to be made making Appellant deportable. However, in doing so, it must consider the state court's suspension of proceedings and the felony/misdemeanor sentence. Also, it must consider that the Judge's finding of 'guilty' was predicated upon the nolo contendere plea of Appellant.

Banishment has been deemed by the Ninth Circuit Court as worse than death. Separation from one's family relatives and friends, where one's roots have been grounded in this country for six years is certainly the infliction of punishment in the human sense that far exceeds permissible limits. Where the statute prescribes deportation only upon a conviction and not a mere finding of guilt, to deport under the circumstances is cruel and inhuman.

As said by Justice Douglas in Bridges v. Wixon, 326 U.S. 135:

"'Though deportation is not technically a criminal proceeding, it visits a great hardship in the individual and deprives him of the right to stay and live and work in this land of freedom. That deporation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.'

In a concurring opinion, Justice Murphy makes the following pertinent observation:

"'But the Constitution has been more than an silent, anemic witness to this proceeding. It has not stood idly by while one of its subjects is being excommunicated from this nation without the slightest proof that his presence constitutes a clear and present danger to the public welfare. Nor has it remained aloof while this individual is being deported, resulting in the loss "of all that makes life worth living," Ng Fung Ho v. White, 259 U.S. 276, 284, 66 L. ed 938, 942, 42 S Ct 492.'

"'The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the

rights guaranteed by the Constitution to allpeople within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority."

While we appreciate and agree that deportation proceedings are not criminal in their nature, the effect can be far more serious.

Here, it would be cruel and inhuman to separate Respondent from his family. His loved ones are all minors of tender years who need his love and guidance during these formative years before adulthood. To deport him would also place a tremendous hardship on his wife by having to support these minors with the assistance of Respondent; which might ultimately cause an imposition on state assistance institutions. Respondent would rather stay with his family than to be forever separated from them.

CONCLUSION

Whereas here deportation is sought to be effected predicated upon the petitioner's having been "convicted" of a crime, a strict interpretation of the deportation statute

should be followed, otherwise the consequence of the deportation constitutes a violation of Due Process and is cruel and unusual and result in punishment far more severe than the mere infliction of a jail sentence predicated upon a conviction.

By reason of the foregoing the Petitioner prays this Court should sustain Petitioner's objections and enter an Order that the Order of Deportation be annulled.

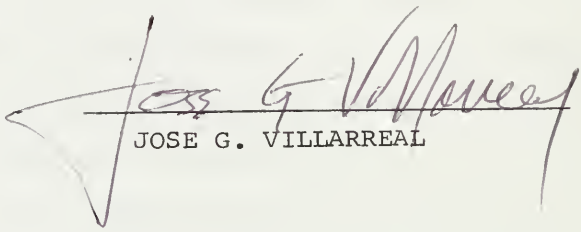
Respectfully submitted,

JOSE G. VILLARREAL

Attorney for Petitioner

C E R T I F I C A T E

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.



JOSE G. VILLARREAL

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, said I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of 18 years and not a party to the within action or proceedings; that my business address is 430 South Broadway, Los Angeles, California. That on March , 1967, I served the within Petitioner's Brief of Petition for Judicial Relief on the respondent in said action by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a mailbox regularly maintained by the U. S. Government at Los Angeles, addressed to the attorney of record for said respondent at the office address of said attorney, as follows:

Office of the Attorney General
Department of Justice
Washington, D.C.
Legal Department-A 11-966-902 No. 21393

U. S. Attorney Office
312 North Spring Street
Los Angeles, California

United States Department of Justice
Immigration and Naturalization
Washington, D.C.
Legal Department-A-11-966-902
No. 21393

Mr. J. Swreck
Regional Counsel
Immigration and
Naturalization
Terminal Island, Calif

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on March 11, 1967 at Los Angeles, California.

Isabel Villarreal
ISABEL VILLARREAL